Supreme Court, U.S.
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No. 92-1144

In The

Supreme Court of the United States

October Term, 1992

IMAGINEERING, INC. and KNIGHTEN BROS. CONSTRUCTION CO.,

Petitioners,

v.

KIEWIT PACIFIC COMPANY; KIEWIT CONSTRUCTION COMPANY; and PETER KIEWIT SONS', INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

IRWIN H. SCHWARTZ
(Counsel of Record)
710 Cherry Street
Seattle, WA 98104-1906
(206) 623-5084

SHERYL GORDON MCCLOUD
1111 Third Avenue, Suite 1060
Seattle, WA 98101
(206) 224-8777

Attorneys for Kiewit Pacific Company; Kiewit Construction Company; and Peter Kiewit Sons', Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Each petitioner is a disappointed potential subcontractor of a bidder that competed unsuccesfully for a prime contract. The court below ruled that petitioners cannot assert a RICO claim against the prime contractor to which the government let the job.

Is that decision consistent with this Court's decisions barring claims of "passed on" injury under the Clayton Act and RICO?

LIST OF PARTIES

Kiewit Construction Group, Inc. is the parent company that owns respondents Kiewit Pacific Co. and Kiewit Construction Company. Kiewit Construction Group, Inc. is entirely owned by Peter Kiewit Sons', Inc. Neither the subsidiaries nor the parent company has issued shares to the public.[1]

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[1] PKS Information Services, Inc. is a direct subsidiary of Peter Kiewit Sons', Inc. It is more than 90% owned by Peter Kiewit Sons', Inc. The remaining shares are owned by the employees. Kiewit Diversified, Inc. is a direct wholly owned subsidiary of Peter Kiewit Sons', Inc. The only indirect subsidiaries of Kiewit Diversified, Inc. whose shares are publicly traded are CCL Industries, Inc. and California Energy Company, Inc.

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STATEMENT OF THE CASE

1. Procedural history and summary of RICO claims

Three plaintiffs filed a RICO[2] claim against Peter Kiewit Sons', Inc., Kiewit Pacific Co., Kiewit Construction Co. (hereafter, collectively, "Kiewit"), and Paschen Contractors, Inc. The original complaint alleged that the plaintiffs were deprived of potential subcontracts for unspecified work on several public works projects. This "deprivation" allegedly occurred because various unnamed government agencies awarded prime contracts to Kiewit, rather than to other prime contract bidders that the plaintiffs preferred. As a result, the unsuccessful bidders for the prime contracts could not let subcontracts to petitioners or to any other company on those projects.

The district court dismissed the original complaint for lack of Article III and RICO standing. It ruled that plaintiffs alleged only a generalized grievance without specifying particular work of which they had been deprived and also failed to allege other elements of RICO. Order, pp. 6-9, CR:46,[3] 759 F. Supp. 1498 (W.D. Wash. 1991); A41-49.[4] The district court, however,

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[2] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c).

[3] We use "CR:xx" to designate the docket number in the Clerk's Record of the district court at which the cited document is located.

[4] We use "A___" to designate the page of the Appendix to the Petition to which we refer.

allowed plaintiffs to amend "to allege specific subcontracts that they would have received but for the 'conduit' scheme." Order, p. 2, CR:57.

Two plaintiffs amended their complaint, adding claims under 42 U.S.C. §§ 1981, 1982, 1985(3) and Washington law, but still failing to allege specific subcontracts that they would have received. CR:59 (amended complaint).[5] Each petitioner alleged that Kiewit bid for and received a public works construction contract that it did not deserve, and that a second place bidder (in petitioner Knighten Brothers' case)[6] or a third place bidder (in

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[5] As the Court of Appeals stated, "It is impossible to determine from the amended complaint whether the plaintiffs are claiming loss of opportunity to realize profits or loss of specific identifiable profits." Petition p. 8 (quoting A14). Petitioners err in asserting, without any citation to their complaint, "In fact, petitioners pleaded both, having been directed by the district court to allege specific contracts that petitioners lost as a result of Kiewit's unlawful scheme." Petition p. 8 n.3. The amended complaint still failed to identify specific subcontracts.

[6] Knighten Brothers' claim appears at ¶ 33, which provides in full:

> The City of Seattle first awarded the Cedar Falls Dam Contract in April 1986 to Morrison-Knudsen, which had designated plaintiff Knighten Brothers as an MBE subcontractor. Kiewit and Global successfully protested this award, and the contract was rebid. On the rebid, Kiewit submitted the low bid, designating Global as an MBE subcontractor. Because Global was a conduit as described above, Kiewit's bid did not meet the set-aside requirements and Kiewit should not have received the prime contract. The second low bidder on the rebid was Morrison-Knudsen, which again designated Knighten Brothers as an MBE subcontractor. Morrison-Knudsen's bid did not desig-

petitioner Imagineering's case) should have received that prime contract instead.[7] If the unsuccessful bidder had been awarded the contract, petitioners asserted, then they would have received some unspecified subcontract work.

The district court dismissed the amended complaint. Order, CR:88, A28. The Ninth Circuit affirmed. Applying *Holmes v. Securities Investor Protection Corp.*, ___ U.S. ___,

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nate any fronts as MWBE subcontractors. Morrison-Knudsen should have received the prime contract, and Knighten Brothers and other members of the class designated as MWBEs by Morrison-Knudsen would have received subcontracts.

[7] Imagineering's claim appears at amended complaint ¶ 32:

As a result of the conduit scheme, plaintiff Imagineering was deprived of a subcontract on the West Seattle Low Bridge project. The West Seattle Low Bridge was awarded by the City of Seattle in 1988 to Kiewit-Global, a joint venture. Because Global was a conduit as described above, Kiewit-Global should not have received the contract. The second low bidder was General Construction Co./3A Industries, a joint venture, which used 3A Industries (a conduit) to satisfy the set-aside requirements. The lowest bidder not using a front or conduit was the third lowest bidder, Guy F. Atkinson Const. Co. In its bid, Atkinson designated Imagineering as a WBE. Because the two lowest bidders intended to use conduits (and Kiewit has in fact used, and continues to use, Global as a conduit on the project) the set-aside requirements were not met by the two lowest bidders and the prime contract should have been awarded to Atkinson, and Imagineering and the other members of the class designated by Atkinson in its bid as MWBEs would have received subcontracts.

112 S.Ct. 1311 (1992), the Ninth Circuit ruled that petitioners, as possible subcontractors, could not assert a RICO claim of harm passed on by the awarding government agency to the unsuccessful prime contractors and by those unsuccessful prime contractors to them:

> The direct harm in this case runs to the prime contractors. It was the intervening inability of the prime contractors to secure contracts that was the direct cause of plaintiffs' injuries. Under *Holmes*, the MWBE plaintiffs are missing the direct relationship needed to show Kiewit proximately caused their injuries.

A18.

The Ninth Circuit also affirmed dismissal of the RICO claims on an alternative state law ground. It ruled that under Washington law, a second place bidder had no claim to the prime contract and petitioners had no guarantee of receiving or retaining any subcontracts. Hence, petitioners "failed to establish RICO standing." *See* A12-15.

2. The district court lacked jurisdiction

The district court lacked jurisdiction. Petitioners lacked RICO standing for the reasons discussed by the court below, A12-15. Standing is a threshold, jurisdictional, inquiry, *see, e.g., Whitmore v. Arkansas*, 495 U.S. 149, 154-56 (1990); *Warth v. Seldin*, 422 U.S. 490, 498 (1975), and the fact that petitioners lacked standing meant that the district court lacked jurisdiction. In addition, petitioners are barred from bringing suit by Article III and its related

prudential limitations[8] on standing. Article III requires that there be an actual "case or controversy."[9] Petitioners lacked standing because (as we discuss, below) neither one alleged an injury directly attributable to Kiewit.

REASONS WHY THE PETITION SHOULD BE DENIED

Respondents respectfully request that this Court deny the petition for writ of certiorari.

I. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY RESOLVED THE SINGLE ISSUE PETITIONERS RAISE

The court below fully considered the question petitioners raise.[10] A15-19 (following *Holmes* and affirming dismissal because, "The direct harm in this case runs to the prime contractors. It was the intervening inability of

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[8] *See generally* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471-75 (1982).

[9] Warth v. Seldin, 422 U.S. 490, 498. Of particular importance in this case, the litigant must satisfy "the 'causation' and 'redressability' prongs of Art. III minima by showing that the injury 'fairly can be traced to the challenged action' and is 'likely to be redressed by a favorable decision.' " Whitmore v. Arkansas, 459 U.S. 149, 155 (quoting Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976)).

[10] Petitioners never briefed this issue of Clayton Act standing before the Ninth Circuit. They raised it for the first time at oral argument, based on a letter of supplemental authorities filed with the appellate court only days earlier.

the prime contractors to secure the contracts that was the direct cause of plaintiffs' injuries.").

The court below also decided that question correctly. Its conclusion is consistent with every applicable Clayton Act and RICO standing case this Court has decided.[11]

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728 (1977), this Court rejected plaintiffs' claim that the manufacturers' price fixing injured them, within the meaning of § 4 of the Clayton Act, 15 U.S.C. § 15, because the overcharges were "passed on" to them by the general contractors. This Court ruled that "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of the section. . . . " 431 U.S. at 729. This Court concluded,

> [O]n balance, and until there are clear directions from Congress to the contrary, we conclude that the legislative purpose in creating a group of " 'private attorneys general' " to enforce the antitrust laws under § 4 . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than

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[11] The *only* decisions of this Court that petitioners cited in support of their argument are Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983), a case in which this Court ruled that the plaintiff union *lacked* standing, and Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982). As we explain in this section the holding below does not contradict these decisions; both endorsed the bar against claims of "passed on" harm under the Clayton Act.

> by attempting to apportion the overcharge among all that may have absorbed part of it.

431 U.S. at 746.[12]

The injury alleged by plaintiffs in *Illinois Brick* was "passed on" from manufacturers to contractors, and from contractors to consumers. The consumers lacked standing:

> Petitioners manufacture and distribute concrete block in the Greater Chicago area. *They sell the block primarily to masonry contractors, who submit bids to general contractors for the masonry portions of construction projects. The general contractors in turn submit bids for these projects to customers* such as the respondents in this case, the State of Illinois and 700 local governmental entities. . . . Respondents are thus indirect purchasers of concrete block, which passes through two separate levels in the chain of distribution before reaching respondents.

431 U.S. at 726 (emphasis added). So too here: the potential subcontracts that petitioners in this case sought must also "pass[] through two separate levels in the chain of distribution before reaching" petitioners, *i.e.*, they must pass from the government to petitioners' preferred prime contractors, and then to petitioners themselves. Petitioners lack standing for the same reason that the indirect purchasers of concrete block in *Illinois Brick* lacked standing.

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[12] *Illinois Brick* was based on Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), in which this Court rejected an antitrust defense claim that indirect rather than direct purchasers were the parties injured.

In *Kansas v. Utilicorp United, Inc.*, ___ U.S. ___, 110 S.Ct. 2807 (1990), for the same reason, this Court precluded indirectly injured customers (or states on their behalf) from suing under the Clayton Act.

> We must decide who may sue under § 4 when, in violation of the antitrust laws, suppliers overcharge a public utility for natural gas and the utility passes on the overcharge to its customers. Consistent with Hanover Shoe, Inc. v. United Shoe Machinery Corp. . . . and Illinois Brick Co. v. Illinois . . . , we hold that only the utility has the cause of action because it alone has suffered injury within the meaning of § 4.

110 S.Ct. at 2810. The decision rejected plaintiffs' suggestion that an exception be made for cases involving regulated public utilities or situations that "resemble" cost-plus contracts.

In *Kansas v. Utilicorp United, Inc.*, the injury was passed on from suppliers to utilities, and utilities to consumers. The consumer states lacked standing:

> Like the State of Illinois in Illinois Brick, the consumers in this case have the status of indirect purchasers. *In the distribution chain, they are not the immediate buyers from the alleged antitrust violators. They bought their gas from the utilities, not from the suppliers said to have conspired* to fix the price of the gas. Unless we create an exception to the direct purchaser rule established in Hanover Shoe and Illinois Brick, any antitrust claim against the defendants is not for them, but for the utilities to assert.

110 S.Ct. 2807, 2812 (emphasis added). Both petitioners here and the public utility customers there sought their

product – here, subcontracts, there gas – from a middleman, "not from the suppliers said to have conspired. . . ." These petitioners lack standing for the same reason that the derivatively injured consumers in *Kansas v. Utilicorp United, Inc.* lacked standing.

In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 534-35, 544-45, this Court held that the plaintiff unions did not suffer compensable antitrust injuries by an employer association's coercion of third parties and employees, in spite of the complaint's allegation that the coercion towards those parties adversely affected the unions. The alleged injury was passed on by too many entities before it affected the plaintiff union.

In *Associated General Contractors*, the injury was passed on from a multiemployer association to general contractors and owners, and from contractors and owners to the plaintiff union. The union lacked standing:

> The Union's antitrust claims arise from alleged restraints caused by defendants in the market for construction contracting and subcontracting. *The complaint alleges that defendants "coerced" two classes of persons: (1) landowners and others who let construction contracts, i. e., the defendants' customers; and (2) general contractors, i. e., defendants' competitors and defendants themselves.* Coercion against the members of both classes was designed to induce them to give some of their business – but not necessarily all of it – to nonunion firms.

459 U.S. at 527-28 (footnotes omitted) (emphasis added). In the present case, petitioners alleged that Kiewit

defrauded government agencies who let construction contracts. Under *Associated General Contractors*, an allegedly defrauded agency might have antitrust standing. That, however, does nothing to aid petitioners. These petitioners are neither the "landowners . . . who let construction contracts," nor the "general contractors" who sought such contracts; these petitioners are not "defendants' competitors." They are one step even more removed than the general contractors; they are potential subcontractors of those general contractors. They are one step even more removed than "defendant's competitors"; they are possible subcontractors to those firms. They are two steps more removed than the governmental agencies who "let construction contracts." Thus, these petitioners lack standing under *Associated General Contractors* because their position is akin to that of the union which attempted to claim standing – not akin to the position of the project owner.

The portion of *Associated General Contractors* that the petition quotes (at p. 16) does state that "subcontractors" can assert antitrust claims. But petitioners neglect to note that the subcontractors could assert a claim in that case solely because they alleged that the multiemployer association defendant directly harmed them by coercing its members to send their business directly to other subcontractors – not to other subcontractors via other prime contractors. 459 U.S. at 522-23 (quoting complaint's allegations). If petitioners here asserted a claim against Kiewit, as contractor, for wrongfully failing to hire them directly as subcontractors, then their quote from *Associated General Contractors* might be apt. But petitioners

asserted a claim against Kiewit for defrauding the government, depriving other prime contract bidders of work, and only thereby harming petitioners. The quote and the comparison to the subcontractors in *Associated General* is, therefore, inapt.

In *Blue Shield of Virginia v. McCready*, 457 U.S. 465, this Court held that a subscriber who paid a psychologist had standing under § 4 of the Clayton Act to sue the plan for its failure to reimburse her. *McCready* reaffirmed the validity of *Illinois Brick* and *Hanover Shoe*'s rule against standing to allege an injury "passed on" by a direct purchaser. 457 U.S. at 474-75 & n.11. *McCready* held only that the subscriber in that case suffered a unique and distinct injury, not "passed on" by anyone:

> McCready has paid her psychologist's bills; her injury consists of Blue Shield's failure to pay her. Her psychologist can link no claim of injury to himself arising from his treatment of McCready; he has been fully paid for his service and has not been injured by Blue Shield's refusal to reimburse her for the cost of his services. And whatever the adverse effect of Blue Shield's actions on McCready's employer, who purchased the plan, it is not the employer as purchaser, but its employees as subscribers, who are out of pocket as a consequence of the plan's failure to pay benefits.

457 U.S. at 475 (footnote omitted).

In *McCready*, the plaintiff suffered harm because Blue Shield failed to pay her, directly. Blue Shield was not obligated to pay anyone else, who would then pay McCready. 457 U.S. at 475. No one else lost money on the

deal. The result is therefore the same under *McCready* as under *Illinois Brick*, *Holmes*, and the other cases discussed above. Petitioners' claims of harm are derivative of unsuccessful prime contractors' claims of harm and thus are barred by the "passing on" rule endorsed by all of those cases.

Petitioners' only claim of special injury, distinct from that of the unsuccessful prime contractors' loss, is that the alleged scheme targeted them, and not the prime contractors from which they sought work.[13] Under *McCready*, however, this is irrelevant:

> The availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators. Here the remedy cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market.

457 U.S. at 479.[14]

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[13] Petition p. 19, n.13 ("Unlike prime contractors, MWBEs were excluded from participating in public works projects precisely because of their status as MWBEs. The scheme diverted money that was earmarked for MWBEs to Kiewit's own pockets. To deny standing to the MWBEs is to deny a remedy to those most completely and most directly injured by the conduit scheme.").

[14] *Accord Associated General Contractors*, 459 U.S. at 537 ("We are also satisfied that an allegation of improper motive, although it may support a plaintiff's damages claim under § 4, is not a panacea that will enable any complaint to withstand a motion to dismiss. Indeed, in McCready, we specifically held: 'The availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators.' ") (footnote omitted).

In *Holmes v. Securities Investor Protection Corp.*, ___ U.S. ___, 112 S.Ct. 1311 (1992), this Court addressed whether RICO plaintiffs can use the "passing on" theory that antitrust plaintiffs cannot. The answer was no. The Securities Investor Protection Corporation (SIPC) alleged that Holmes "conspired in a stock-manipulation scheme that disabled two broker-dealers from meeting obligations to customers, thus triggering SIPC's statutory duty to advance funds to reimburse the customers." 112 S.Ct. at 1314. Relying on antitrust precedent, the *Holmes* decision explicitly rejected the argument that Congress did not intend RICO litigants to be burdened with the standing limitations prevalent in antitrust litigation.[15] Instead, this Court stated: "the reasons that supported conforming Clayton Act causation to the general tendency apply just as readily to the present facts, *underscoring the obvious congressional adoption of the Clayton Act direct-injury limitation among the requirements of § 1964(c).*" 112 S.Ct. at 1320 (emphasis added). Hence, this Court ruled that SIPC – or the customers in whose shoes it stood – lacked standing, because the customers were indirectly injured by damages sustained by their brokers. This Court explained: "a plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts . . . generally . . . stand[s] at too remote a distance to recover." *Holmes* at 1318 (citation omitted). Since petitioners complain of harm "flowing merely from

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[15] 112 S.Ct. at 1318 n. 15, *citing* 115 Cong. Rec. 6995 (1969) (ABA Comments on S. 2048).

the misfortunes visited upon" unsuccessful prime contractors, they also stand "at too remote a distance to recover."[16]

The decision below is consistent with all these Clayton Act and RICO decisions, because all comport with the general rule barring a plaintiff from asserting a claim of "passed on" injury. The real question petitioners raise is whether a new exception to the bar against asserting "passed on" claims of injury should be made for them. Petition p. 16, n.11 (listing reasons why petitioners' claim does not present a risk of duplicative recovery).[17] This is

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[16] In Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), cited by petitioners (p. 15) in support of their claim, this Court rejected a "racketeering injury" requirement that some lower courts had added to § 1964(c). *Sedima* did not reject this Court's bar against assertion of "passed on" injuries. The portion of the *Sedima* dissent to which petitioners refer (Petition p. 12, n.7) acknowledges that *direct* competitors of a business that engages in racketeering activity to enhance profits can bring "civil RICO actions alleging injury by reason of the enhanced commercial position the enterprise has obtained from its unlawful acts." 473 U.S. at 522. If petitioners were direct competitors of Kiewit, perhaps *Sedima*'s standing holding would benefit them. Petitioners, however, were not. They are disappointed potential subcontractors of a bidder that competed with Kiewit for a prime contract and lost. Neither petitioner has standing under *Sedima*.

[17] Although we believe it is inappropriate for this Court to consider whether to make an exception to the *Illinois Brick* passing on rule, we must also point out that petitioners err in claiming (Petition p. 16, n.11) that their case is a good one for such an exception (because it presents no risk of duplicative recovery). This case certainly does present the risk of duplicative recovery. Here, as in the cases discussed in text, other parties may sue. If an unsuccessful contractor or the government agency itself tries

a question that is particularly inappropriate for *certiorari*. The whole point of the direct purchaser limitation is to avoid embroiling the federal courts in such disputes:

> . . . The rationales underlying Hanover Shoe and Illinois Brick will not apply with equal force in all cases. We nonetheless believe that ample justification exists for our stated decision not to "carve out exceptions to the [direct purchaser] rule for particular types of markets." Illinois Brick, 431 U.S., at 744. . . . The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule.
>
> > "[T]he process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the Hanover Shoe rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would inject the same 'massive evidence and complicated theories' into treble-damages proceedings, albeit at a somewhat higher level of generality." Id., at 744-45. . . .
>
> *In sum, even assuming that any economic assumptions underlying the Illinois Brick rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions.* Having stated the rule in Hanover Shoe, and adhered to it in Illinois Brick, we stand by our interpretation of § 4.

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to sue later – after petitioners – the risk of duplicative recovery arises. If an unsuccessful prime contractor tries to sue later, for itself and also for other subcontractors who competed against petitioners, the risk is present.

Kansas v. United Utilicorp, Inc., 110 S.Ct. 2807, 2817 (quotes and brackets in original) (emphasis added).

II. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE OTHER APPELLATE RICO OR ANTITRUST STANDING DECISIONS; THE ALLEGEDLY CONFLICTING DECISIONS INVOLVED DIFFERENT FACT PATTERNS

There is no conflict between the decision below and the decisions of the other Courts of Appeal. This is true of appellate court decisions under RICO and the Clayton Act.

Appellate courts have rejected the "passing on" theory when considering a private party's RICO standing to bring claims for damages caused by a fraud upon the government. They have ruled that private plaintiffs lack standing to sue a private defendant for a scheme to defraud the government.[18] Where, as here, a RICO claim

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[18] *See generally* O'Malley v. O'Neill, 887 F.2d 1557 (11th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) (affirming dismissal of RICO claim alleging scheme to defraud the federal government by improperly obtaining federal student aid funds, because this fraud on the government was not the direct cause of these plaintiffs' loss of work opportunities); Brandenburg v. Seidel, 859 F.2d 1179, 1188 (4th Cir. 1988) (would be class of private civil plaintiffs sued private defendants, various savings and loan associations and related parties, alleging that "[a]s a result of defendants' violations of law, a run did take place on MSSIC institutions, including First Maryland, and First Maryland was unable to meet . . . its obligations to depositors. . . . " (*id.* at 1188); complaint dismissed because plaintiffs lacked standing to raise claim that the government entity supervising the savings and loans had been harmed); Carter v. Berger, 777 F.2d 1173 (7th Cir.

is brought by plaintiffs who also claim they suffered injury as a result of fraud on the government, the plaintiffs also lack standing.

Similarly, the appellate courts are virtually unanimous in dismissing private plaintiffs' RICO claims based on allegations that a defendant engaged in a fraudulent RICO scheme, and fired the plaintiff for refusing to go along with it. Such claims are dismissed for failure to allege standing, injury, or proximate cause.[19]

1985) (taxpayer/plaintiffs lacked standing to bring RICO claims against private defendants who bribed county tax board members to obtain favorable tax assessments; the county, the only party directly affected by the fraud, was the one with standing); United Fence & Guard Rail v. Royal Guard Fence, 765 F. Supp. 55, 57-58 (E.D. N.Y. 1991) (dismissing RICO claim by non-minority contractor against its MBE competitors alleging they were "fronts" which obtained state contracts through fraud, for failure to satisfy § 1964(c)'s causation requirement and failure to allege harm to a property right; "the scheme, assuming one existed, was designed to defraud the State and NYDOT, and was not intended to defraud plaintiff"); District Telecommunications Dev. Corp. v. District Cablevision, Inc., 638 F. Supp. 418, 422 (D. D.C. 1985) (dismissing private RICO claim because "plaintiff was not the prime target of any alleged fraud, but rather a third-party recipient of its effects").

[19] *E.g.*, Reddy v. Litton Indus., 912 F.2d 291, 294 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 332 (1991) (fired whistle blower "lacks standing to sue under § 1962(c)"); Hecht v. Commerce Clearing House, Inc., 897 F.2d 21 (2d Cir. 1990) (plaintiff alleges loss of employment for failure to go along with employer's RICO scheme targeted at customers; complaint states no compensable RICO injury and plaintiff lacks "civil RICO standing"); O'Malley v. O'Neill, 887 F.2d 1557, 1561; Norman v. Niagara Mohawk Power Corp., 873 F.2d 634, 636-37 (2d Cir. 1989); Cullom v. Hibernia Nat'l Bank, 859 F.2d 1211, 1214 (5th Cir. 1988); Pujol v. Shearson/American Express, Inc., 829

Another typical fact pattern involves allegations by employees or shareholders that they were harmed derivatively by a defendant's racketeering harm to their corporation. The courts are virtually unanimous in dismissing such RICO claims because the plaintiff is not the party directly injured.[20]

F.2d 1201, 1204-05 (1st Cir. 1987); Morast v. Lance, 807 F.2d 926, 932-33 (11th Cir. 1987).

[20] *See, e.g.*, Sanders Confectionary Products v. Heller Financial, 973 F.2d 474, 487 (6th Cir. 1992) ("When the acts alleged lower the corporation's value, the corporation suffers the direct injury, and the shareholders suffer as a result because their investment is worth less"; hence no shareholder standing to claim this loss under RICO); In re Sunrise Securities Litigation, 916 F.2d 874 (3d Cir. 1990) (depositors of savings and loan association in FSLIC receivership had no standing to sue association officers and directors because their injuries were derivative of association injury for which only receiver had standing to sue); Rylewicz v. Beaton Services, Ltd., 888 F.2d 1175, 1179 (7th Cir. 1989) ("The standing rule that stockholders may not bring individual claims under RICO for diminution in the value of the corporation prevails in all the Circuits that have considered the matter."); Flynn v. Merrick, 881 F.2d 446 (7th Cir. 1989) (shareholders and debenture holders lack standing to sue for corporate injuries); Sparling v. Hoffman, 864 F.2d 635 (9th Cir. 1988) (affirming dismissal of RICO claim because neither shareholder nor employee of a corporation can maintain a RICO claim based on harm to the corporation); Roeder v. Alpha Industries, 814 F.2d 22, 29 (1st Cir. 1987) (affirming dismissal of shareholder fraud-based RICO claim for lack of standing); Rand v. Anaconda-Ericsson, Inc., 794 F.2d 843, 849 (2d Cir.), *cert. denied*, 479 U.S. 987 (1986) ("[D]iminution in value of the corporate assets is insufficient direct harm to give the shareholder standing to sue in his own right"; dismissing RICO claim); Warren v. Manufacturers Nat'l Bank of Detroit, 759 F.2d 542 (6th Cir. 1985).

The lower court RICO cases cited by petitioners are distinguishable on their facts. Some of those RICO cases really stand for the unremarkable rule that a directly injured bidder can bring a claim against its direct competitor or, in certain circumstances, against the owner of the project.[21] None of those cases support petitioners' claim that a disappointed subcontractor of an unsuccessful bidder can sue a successful bidder.

Petitioners cited three RICO cases as examples of decisions that discard the "direct" or "indirect" injury inquiry. First, they cited *Zervas v. Faulkner*, 861 F.2d 823, 833 (5th Cir. 1988), Petition p. 21, for this new rule. Actually, in *Zervas*, the Fifth Circuit *reversed* a jury verdict

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In fact, in Holmes v. SIPC, 112 S.Ct. at 1321, this Court cited with approval Mid State Fertilizer v. Exchange Nat'l Bank of Chicago, 877 F.2d 1333, 1336 (7th Cir. 1989), which also held that shareholders who suffer injury derivative of their corporation have no standing to bring a RICO claim.

[21] In Anderson-Myers Co. v. Roach, 660 F. Supp. 106 (D. Kan. 1987) (Petition p. 14, n.9), for example, the plaintiff was the unsuccessful bidder and the claim was against the government, not a private party. In Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052 (3d Cir. 1988), *aff'd*, 493 U.S. 400 (1990), (Petition p. 13), the plaintiff was a direct competitor of the defendant, not a would-be subcontractor of a competitor of the defendant. In both Iconco v. Jensen Constr. Co., 622 F.2d 1291 (8th Cir. 1980) and Service Engineering Co. v. Southwest Marine, Inc., 719 F. Supp. 1500 (N.D. Cal. 1989) (Petition p. 14), each plaintiff was the second lowest bidder suing a direct competitor on a job that another business won under a small business set-aside. Further, neither *Jensen* nor *Service Engineering* applied this analysis to RICO claims – *Jensen* involved a claim solely under Iowa law, and *Service Engineering* involved a plaintiff who failed to allege a pattern of racketeering so the RICO claim was dismissed for that reason.

for plaintiffs on their RICO claims precisely because the connection between the injury and predicate act was not close enough. 861 F.2d at 835. Next, petitioners cited *Bass v. Campagnone*, 838 F.2d 10, 12 (1st Cir. 1988), Petition p. 21, for this proposition. While *Bass* rejects the use of the words "direct" and "indirect" for determining whether plaintiffs had standing, 838 F.2d 10, 11, it used other words to come to the same conclusion as *Illinois Brick*, *Holmes*, etc., in rejecting claims of passed on injury. It affirmed dismissal of RICO claims brought by members of a union local against the local's president because the injuries alleged – operating the local as a racketeer influenced organization, for his own personal financial benefit – were suffered by the local, and not by individual members. "In short, the local – and not the plaintiffs – is the real party in interest to this RICO action." 838 F.2d at 13. Finally, they cited *Willis v. Lipton*, 947 F.2d 998, 1000 (1st Cir. 1991), Petition p. 21, for this rule. In *Willis*, the court actually affirmed dismissal of a civil RICO claim. Citing the general rule that shareholders' and employees' harms are "incidental to the corporation's injury," 947 F.2d 998, 1001, the court ruled that this plaintiff's claim was "derivative in nature," *id.*, because the corporation was the immediately injured party and the plaintiff was injured only derivatively, as a stockholder and employee.

Thus, although these cases may reject the "direct" or "indirect" nomenclature, they all embrace the bar against "passed on" claims of injury. They are completely consistent with the decision below.[22]

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[22] Petitioners cite another case in support of their claim which, like Willis v. Lipton, actually stands for the rule that a

Other lower court RICO decisions relied upon by petitioners are distinguishable for a variety of other reasons.[23] None of the RICO decisions petitioners cite has

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plaintiff whose injury is derivative of a corporation's injury may not assert his own RICO claim. In Bankers Trust Co. v. Rhoades, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989) (Petition, p. 20), the court did hold that Bankers Trust suffered an injury separate from, and not passed on by, the bankrupt corporation; it therefore suffered injury "directly," 859 F.2d at 1101, and could sue for that injury under RICO. This case explicitly recognized the continuing validity of the Second Circuit's holding in Rand v. Anaconda-Ericsson, 794 F.2d 843, *supra*, p. 18, n.20, that a shareholder of an injured corporation lacks standing to bring a RICO claim because the injury is derivative of the corporation's injury; the *Bankers Trust* decision simply found that holding inapplicable.

[23] Petitioners cite Terre du Lac Ass'n v. Terre du Lac, Inc., 772 F.2d 467, 472 (8th Cir.), *cert. denied*, 475 U.S. 1082 (1986) (Petition p. 20). In *Terre du Lac*, plaintiffs, a property owners' association, alleged that the developers of their subdivision failed to fulfill their promises to pave roads, complete sewage and water systems, etc. The appellate court held that the Association had standing to sue on behalf of its members, despite defendants' argument that "these allegations of injury are not sufficient to establish the Association's standing, since the Association does not allege that it was the target of the alleged mail fraud . . . " 772 F.2d at 472. That court did not reverse dismissal of any "passed on" injury, however; its only statement concerning this issue was a rejection of "defendants' argument that the Association lacks standing merely because it may pass its alleged injuries on to its members." *Id.* at 473. The only holding of Schiffels v. Kemper Financial Servs., 978 F.2d 344 (7th Cir. 1992) (Petition p. 19), was that a plaintiff alleging a RICO conspiracy, § 1962(d), need not allege injuries resulting from predicate acts of racketeering – injury from an overt act of the conspiracy will do; the court still went on to state that Schiffels only "has standing to sue under RICO if her complaint alleges an injury to her business or property proximately caused by an

held that RICO plaintiffs can evade the bar against asserting "passed on" claims of injury.

The appellate antitrust cases petitioners cited are also distinguishable. Some are simply irrelevant to the question petitioners present.[24] Others apply to different facts than those presented here. For example, petitioners cited some antitrust cases for the rule that two entities, not just one, can sometimes assert antitrust claims against the same defendant without running afoul of the "passing on" rule. Petition pp. 17-18. This is certainly true, where neither plaintiff's claim is "passed on" by the other.[25]

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over act in furtherance of a conspiracy to violate RICO," and that her complaint appeared deficient in several respects.

[24] For example, they cite Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711, 730 (3d Cir. 1986), *cert. denied*, 480 U.S. 910 (1987) and Parks v. Watson, 716 F.2d 646, 659-60 (9th Cir. 1983), antitrust cases, in support of their claim that "loss of a business opportunity" is loss of a sufficiently definite property right to establish standing. Petition, pp. 10-11. The court below did not affirm dismissal solely due to failure to allege a property right; in the only ruling Petitioners challenge, the court below affirmed dismissal because, no matter what kind of property right was claimed, the injury was too attenuated because it was passed on by the directly injured prime contractors.

[25] In Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp., 951 F.2d 1158 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1947 (1992) (Petition, p. 17), for example, the court held only that consultants who offered advice to businesses on advertising effectively and cheaply in the yellow pages had standing to bring an antitrust claim against GTE, for adopting a policy that tended to force the consultants out of the market – because all the consultants were *direct* competitors of defendant GTE in the exact same market. The decision's subsequent *dicta*, 951 F.2d at 1163, that advertisers might have standing to sue

That is not the case here, however. Petitioners cited no decision that would allow plaintiffs with such an attenuated claim of entitlement and complex chain of causation to sue.

III. THE QUESTION PRESENTED IS MOOT BECAUSE DISMISSAL WAS APPROPRIATE FOR OTHER REASONS, ALSO

The question presented is moot because dismissal of the RICO claim was appropriate for other reasons. First, harm to a property right is an element of a RICO claim based on mail fraud.[26] Washington law is clear[27] that

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GTE also, only shows that in certain cases a defendant's wrongful acts can harm two separate parties directly. This is not such a case. In Los Angeles Memorial Coliseum Comm'n v. NFL, 791 F.2d 1356, 1365 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987) (Petition p. 18), the court held only that the LA Raiders and the LA Coliseum both had standing to sue the NFL for antitrust violations – *i.e.*, the application of territorial restrictions arising from the Raiders' move from Oakland. Neither plaintiff's harm was derivative of the other's "the NFL's territorial restraints in this case not only impaired competition between NFL football team franchises [like the Raiders], but also restrained competition in the 'stadia market' between rival stadia (such as the Oakland Coliseum and the LA Coliseum) that seek to secure NFL tenants." 791 F.2d at 1365.

[26] *See* 18 U.S.C. § 1964(c) (requiring harm to "business or property" to state a RICO claim); United States v. McNally, 438 U.S. 350 (1987) (the federal mail fraud statute is "limited in scope to the protection of property rights").

[27] "[W]hether a particular interest amounts to property is quintessentially a question of state law." Doe v. Roe, 958 F.2d 763, 768 (7th Cir. 1992). *Accord* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

there is no property right in the mere desire to receive a subcontract – there must be a valid contract or other legally enforceable claim.[28] *See* A14-15 (affirming dismissal for lack of standing, because Washington law is clear that even a contractor's bid for a prime contract from a government agency is not binding and is not a contract; *a fortiori* a subcontractor's desire to receive a subcontract, for which the subcontractor did not bid and did not receive an acceptance, from a losing prime contractor, is not property or a contract either).[29] Thus, the

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[28] Pleas v. Seattle, 112 Wash. 2d 794, 800-02, 774 P.2d 1158 (1989) (tort of intentional interference requires "existence of valid contractual relationship or business expectancy"); Hoffer v. State, 110 Wash. 2d 415, 432, 755 P.2d 781 (1988) (same); Broten v. May, 49 Wash. App. 564, 568-69, 774 P.2d 1085 (1987), *review denied*, 110 Wash. 2d 1003 (1988).

[29] Federal law gives losing bidders for government contracts no right to have their bids accepted, either. Federal regulations provide a detailed scheme for raising the plaintiffs' complaints. None of these procedures, however, includes the sequence of events that the petitioners claim necessarily would have occurred if the purported "conduits" were stripped of their MWBE certification. *See, e.g.*, 49 CFR 23.73 (complaint procedure; no provision for awarding subcontracts to other MBE firm); 49 CFR 23.55(a) (procedure by which third party may challenge MBE's certification; no provision for award of challenged MBE's subcontract to another prime contractor's "designated" MBE); 49 CFR 23.69 (procedure for challenging DBE status; no procedure for substituting other DBEs). *See also* 23 CFR 635.114(f) (for state to reject Kiewit's low bid, it must have the concurrence of the Federal Highway Administration (FHWA)); 23 CFR 635.114(g) (if the state then decides to award to the second-lowest bidder, the FHWA would have to concur in that decision, and FHWA has discretion in deciding whether or not to concur, see Glasgow, Inc. v. Federal Highway Administration, 843 F.2d 130 (3d Cir. 1988)).

complaint was properly dismissed by the district court for failure to allege harm to a property right.[30]

Second, reliance is an element of RICO claims based on mail fraud.[31] Petitioners allege a RICO claim based on mail fraud, but they fail to allege that they themselves ever relied on any purported fraud by Kiewit.[32] The RICO claim was deficient for this reason also.[33]

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[30] *See* Order, p. 5, CR:88, A28.

[31] *E.g.* Pelletier v. Zweifel, 921 F.2d 1465, 1499 (11th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 167 (1991) ("when the alleged predicate act is mail or wire fraud, the plaintiff . . . must have relied to his detriment on misrepresentations made in furtherance of that scheme"); O'Malley v. O'Neill, 887 F.2d 1557, 1563; Brandenburg v. Seidel, 859 F.2d 1179, 1188 n.10; Blount v. Financial Servs. Inc. v. Walter E. Heller & Co., 819 F.2d 151, 152 (6th Cir. 1987) (to properly allege mail fraud as civil RICO predicate, plaintiff must state not just the false statement defendant made, but also the fact that plaintiff relied upon that false statement of fact); Flowers v. Continental Grain Co., 775 F.2d 1051, 1054 (8th Cir. 1985) (same).

[32] The only allegation even vaguely related to this issue is Amended Complaint paragraph 26's assertion, "Government administrators review the reports and representations in question on behalf of and for the benefit of legitimate MWBEs. . . . " Even if this were true, it fails to show that the petitioners relied upon Kiewit's purported fraud.

[33] Neither the district court nor the Ninth Circuit reached the issue whether the amended complaint was also deficient for failing to allege a RICO "enterprise" or "pattern of racketeering." Petitioners' failure to allege these additional elements of a § 1962(c) violation is clear from the amended complaint, however, and would have formed an appropriate basis for dismissal, also.

IV. PETITIONERS MISSTATE CERTAIN FACTS RELEVANT TO THIS COURT'S EXERCISE OF CERTIORARI JURISDICTION

Petitioners state, "In numerous instances, petitioners were identified as subcontractors on the lowest bid in compliance with the set-aside regulations but were excluded from participating in those public works projects as a *direct consequence* of Kiewit's unlawful scheme." Petition p. 5 (citing A4) (emphasis added).[34]

There are two errors here. First, petitioners never pled that they had binding subcontracts to do any of the work identified in the amended complaint. All the amended complaint states is that each petitioner was "designated" by a second or third place bidder on one of the public works projects listed.[35] Second, petitioners'

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[34] Similarly, petitioners claim (at p. 3), "The successful bidder receives a condition of Award letter that makes the participation of the designated MWBEs a *condition of the contract* between the successful bidder and the government agency," citing A2 (emphasis added). The amended complaint's actual allegation on this point is: "The low bidder receives a Condition of Award letter from the government agency owning the project that incorporates the set-aside requirements on the project and the MWBEs that the prime contractor will use to meet the requirements." Amended Complaint, CR:59, paragraph 15.

[35] Actually, the petitioners never allege that the law required the losing contractors to use the MWBEs that they "designated." Paragraph 32 alleges that Imagineering was "designated" as a WBE by the third lowest bidder on some unspecified portion of the West Seattle Low Bridge. It does not allege a commitment between the two firms, and there is no allegation that a "designation" in a bid proposal is binding. In fact, there is no allegation that Imagineering did anything to

preferred prime contractors never had any right to receive the prime contracts from the government. *See* A14-15. Hence, petitioners' purported "exclu[sion]" from participation in public works projects was not a "direct consequence" of the fraudulent scheme alleged.

Petitioners also misstate the facts when they claim that they alleged the injury of exclusion from the "public works construction market" below. Petition p. 7 (citing A5). The amended complaint contains no allegation of exclusion from market share.[36]

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become designated or even knew that it had been designated at the time. Similarly, paragraph 33 alleges that Morrison-Knudsen should have been the prime contractor on the Cedar Falls Dam contract, and Knighten Brothers was "designated" by the second low bidder on the Cedar Falls Dam contract. Again, there is no allegation of a commitment between the two firms, and there is no allegation that a "designation" in a bid proposal is binding. In fact, there is no allegation that petitioner did anything to become designated or even knew that it had been designated at the time.

[36] *Cf.* amended complaint ¶ 17 (listing four types of injuries the purported "conduit scheme" accomplishes, but failing to list petitioners' exclusion from market share).

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

IRWIN H. SCHWARTZ
(Counsel of Record)
710 Cherry St.
Seattle, WA 98104
(206) 623-5084

SHERYL GORDON MCCLOUD
1111 3rd Ave., Suite 1060
Seattle, WA 98101
(206) 224-8777